IN THE

# Supreme Court of the United States

October Term, 1975

**No. 75-104**

UNITED JEWISH ORGANIZATIONS OF WILLIAMSBURGH, INC., *et al.*,

*Petitioners,*

*v.*

HUGH L. CAREY, *et al.*,

*Respondents.*

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF OF AMERICAN JEWISH CONGRESS, ANTI-DEFAMATION LEAGUE OF B'NAI B'RITH and JEWISH LABOR COMMITTEE, *AMICI CURIAE*, IN SUPPORT OF THE PETITION

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Petitioners have challenged certain reapportionment laws adopted by the State of New York, in so far as they affect areas of Kings County, on the ground that the district boundaries were purposefully drawn on the basis of race, in violation of the 14th and 15th Amendments to the

United States Constitution. Their complaint was dismissed and the decision was affirmed, 2 to 1, by the Court of Appeals for the Second Circuit. A petition for writ of certiorari to review the judgment of the Court of Appeals was filed in this Court on July 18, 1975.

## Interest of the *Amici*

This brief is submitted on behalf of three national Jewish organizations, the American Jewish Congress, the Anti-Defamation League of B'nai B'rith and the Jewish Labor Committee. The American Jewish Congress was founded in 1906 and the Jewish Labor Committee in 1934. The B'nai B'rith was founded in 1843 and established its Anti-Defamation League as its educational arm in 1913.

All three of these organizations are concerned with the preservation of the security and constitutional rights of American Jews through the preservation of the rights of all Americans. Since their creation, they have opposed racial and religious discrimination in voting, employment, education, housing and public accommodations. Among their activities devoted to these ends, they have filed briefs as *amici* in this Court in cases where it was felt that the rights of any racial, religious or ethnic group have been threatened. These cases have included *Shelley* v. *Kraemer*, 344 U.S. 1 (1948); *Sweatt* v. *Painter*, 339 U.S. 629 (1950); *Brown* v. *Board of Education*, 374 U.S. 483 (1954); *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968); and *Lau* v. *Nichols*, 414 U.S. 563 (1974).

More specifically, in the area of voting rights, certain of the *amici* filed a friend of the Court brief in *Cardona* v. *Power*, 384 U.S. 672 (1966), urging the unconstitutionality of the New York State literacy test on the grounds that it unlawfully disenfranchised American citizens of Puerto Rican origin.



We submit this brief because we believe that our system of constitutional liberties is impaired when the law gives sanction to the use of race in the decision-making processes of governmental agencies, except in certain circumstances where it is necessary to correct past purposeful discrimination.[1] We regard as unsound the basic postulates on which the 1974 New York reapportionment statutes rested. If those postulates and the resulting reapportionment are upheld, sanction will be given to racial proportional representation, racial and ethnic divisiveness will be intensified, and the process of popular elections on which our government rests will be seriously distorted.

Accordingly, *amici* have sought and obtained the consent of the parties to this case to the submission of this brief.

## Statement

Early in 1972, the State Legislature adopted Chapter 11 of the Laws of New York, 1972, reapportioning the legislative districts of the state on the basis of the 1970 census. Because a literacy test had been in effect in November 1968

1. It is the view of *amici* that, under the First Amendment, the limitations on governmental discrimination based on race are to a large extent applicable also to discrimination based on religion. We confine ourselves in this brief, however, to consideration of distinctions based on race. That is the only issue presently involved in this proceeding since Petitioners do not question here the unanimous conclusion of the Court of Appeals that they did not have standing to sue as a religious group and that they did not have any right to relief as such a group (510 F.2d at 250-51).

and less than 50% of the voting age residents in Kings County and two other counties in New York State had voted in the presidential election that year, it had been determined in 1970 and 1971 that the trigger provisions of Section 4 of the Voting Rights Act (42 U.S.C. Sec. 1973b) applied to these areas.[2]

Section 5 of the Act (42 U.S.C. Section 1973c) requires approval by either the United States District Court for the District of Columbia or the United States Attorney General of any change in the laws affecting voting in a state or county held subject to Section 4 of the Act. Accordingly, Chapter 11 of New York's 1972 Laws was submitted to the Attorney General for approval insofar as it applied to the three counties held to be covered by Section 4 of the Voting Rights Act.

On April 1, 1974, the United States Department of Justice, through Assistant Attorney General J. Stanley Pottinger, informed the New York Attorney General's office that the redistricting in Kings and New York Counties was not acceptable because "we cannot conclude, as we must under the Voting Rights Act, that those portions of these redistricting plans will not have the effect of abridging the right to vote on account of race or color." The Attorney General noted that certain of the lines in these areas had the effect of "overly concentrating" minority populations in certain districts while "diffusing" the remaining minority population into a number of other districts.

2. Application of the Section was at one point lifted but was then held to be still in effect because of a ruling in a separate proceeding that New York State's failure to provide a Spanish translation of the ballots used in the 1973 election constituted illegal use of a literacy test in violation of the Act. *Torres* v. *Sachs,* 381 F. Supp. 309 (S.D. N.Y. 1973).



Because of the imminence of the primary and general elections of 1974, the state did not exercise its right to challenge this ruling but proceeded to adopt new apportionment laws for those two counties. (Laws of New York (1974), Chapters 588-591 and 599). It is not questioned that these statutes were drafted to meet the objections expressed by the Department of Justice in the April 1 letter and that New York's legislative draftsmen understood that in order to meet these objections it was necessary to assure that there would be three Senate and two Assembly districts in Kings County with non-white majorities of at least 65 per cent. New district lines, so drafted, were enacted and again submitted to the Attorney General. In a Memorandum of Decision dated July 1, 1974, they were given the approval required by statute.

These proceedings were initiated in the United States District Court for the Eastern District of New York on June 1, 1974. Petitioners (plaintiffs below), are organizations of voters residing in areas of Kings County affected by the new apportionment laws. Their constitutional challenge asserted their rights, both as whites and as members of a discrete religious group, to legislative boundary lines drawn without conscious, deliberate effort to establish specific racial proportions in designated districts.

## Question Presented

*Amici* ask this Court to grant review of the judgment below to consider the question whether under the 14th and 15th Amendments, apportionment laws may be deliberately drawn to assure minority groups voting control in certain

legislative districts, where there has been no affirmative finding that the prior apportionment was designed to reduce or suppress minority representation.

## Reasons for Granting the Writ of Certiorari

### I. This case presents a vitally important issue as to the validity of racial gerrymandering; its importance has been magnified by recent legislation extending the Voting Rights Act to additional ethnic groups.

This case raises a narrow but critical point—whether the New York State Legislature acted appropriately by employing a racial quota in legislative apportionment so as to assure particular racial groups voting control of certain districts, in the absence of any affirmative finding, judicial or administrative, of a prior discriminatory apportionment designed to reduce or suppress the representation of these groups. Although this is a narrow question, its resolution is of extreme importance. The legal issues raised here will undoubtedly come before the federal courts with increasing frequency because of the recent extension of the Voting Rights Act to substantial areas outside the Southern states, many of which like New York do not have a history of past state-imposed racial discrimination in the apportionment process, and the extension of the Act to specifically cover not only Blacks but persons of Spanish heritage and a number of other language minorities. The need to provide the 33 non-Southern state legislatures soon to be covered by the Voting Rights Act with guidance as they grapple with the complex problems of meeting their responsibilities under that Act and the United States Constitution adds a special urgency to the issues presented here.



All parties to this case, and both the majority and dissenting judges in the Court below, agree that the challenged state legislative plan involved in this case was "specifically drawn to ensure nonwhite voters a 'viable majority' * * * in state senatorial and assembly districts" 510 F.2d 512, 514. As more particularly described by the dissenting justice below: "* * * [T]he Legislative Committee staff proceeded to redraw lines under a controlling mandate to see that seven Assembly and three Senate districts had nonwhite majorities of 65% or greater. The 65% figure was taken on the explicit premise that anything less (given lower rates of voter registration and turnout) would render uncertain the power of the nonwhite majority to control election results in those districts."

This Court's decisions leave no room for doubt that a legislative apportionment scheme designed to achieve electoral control by particular racial groups, control which inevitably fences out other groups, could not constitutionally be adopted. *See, e.g., Gomillion* v. *Lightfoot,* 364 U.S. 399 (1960); *Wright* v. *Rockefeller,* 376 U.S. 52, 67 (1964). The Court has also recognized that allegedly "benign racial districting," even if intended to correct past state apportionments which had virtually deprived Negroes of representation in the state legislature for 75 years and occurring in a context of historic voting, education and other state-imposed racial discrimination, presents a substantial federal question. And it has yet to give constitutional sanction to such action. *Taylor* v. *McKeithen,* 407 U.S. 191, 193-4 (1972).

Nevertheless, the Court below justified New York's admitted effort to establish racial electoral quotas in defined legislative districts because, "Here the New York legislature was not 'starting afresh'; the State had run afoul of the Voting Rights Act" (510 F. 2d 512, 525) and the racial proportional representation decreed in these districts was necessary "[t]o correct an invidious discrimination in favor of white voters and against non-whites which had occurred in Kings County * * *" (510 F. 2d 512, 515).

We submit, however, that neither the factors which made Kings County subject to the provisions of the Voting Rights Act nor the ambiguous, unfocused findings of the Attorney General with respect to the 1972 apportionment, taken singly or together, justify a "remedy" requiring racially conscious gerrymandering designed to assure working majorities to members of particular races.

## II. An election violation arising from the requirement of a literacy test or the provision of an English-only ballot cannot constitutionally be cured by the application of racial quotas to redistricting in the absence of an affirmative finding that the prior apportionment was designed to reduce or suppress minority representation.

### *A. The Absence of Relationship Between the Remedy and the Violation*

The rationale for permitting considerations of race to enter into remedies designed to correct past discrimination requires that the correction be intimately related to the particular violation and the harm it created. "[T]he nature of the violation determines the scope of the remedy." *Mil-*



*liken* v. *Bradley*, 418 U.S. 717, 738 (1974); *City of Richmond* v. *United States*, 95 S.Ct. 2296 (June 24, 1975). Here no such relationship exists; the "foul" under the Voting Rights Act which triggered the operation of Section 5 relied on by the Court of Appeals majority had nothing to do with the type of apportionment adopted for Kings County (510 F. 2d at 517). Kings County became subject to the approval requirements of Section 5 of the Voting Rights Act because (a) a literacy test had been in effect on November 1968; (b) it had been found that less than 50% of the persons of voting age were registered or had voted in November 1968; and (c) although that literacy test was no longer in effect and New York State had been viewed as being in full compliance with the statute, a United States District Court had ruled that New York had violated the Voting Rights Act because it conducted an election with ballots in English only.

The state legislative policy that shaped the 1974 statute was that the Black and Puerto Rican minority viewed as a bloc must have a substantial majority in a specified number of legislative districts. This consideration is totally unrelated to the evil that had caused the Voting Rights Act to be invoked—the disenfranchisement of non-English speaking voters because the ballots used in an election were only in English. The victims of this practice were the Spanish-speaking minority alone, not the Blacks. Even assuming it were constitutionally appropriate to correct the failure to print ballots in Spanish by redrawing district lines, the 1974 lines did not assure or even create the potential of increased specific representation of the Puerto Rican group. (See the Department's Memorandum of Decision, July 1, 1974, pp. 14-16.)

Nor does change of district lines to give working control to minorities ever effect a cure of the evil caused by a literacy test or ballot infringement. That cure is effected by the elimination of the improper test and the printing of the ballot in the appropriate language. At that point the discrimination against the minority voter is remedied, and he can then go to the polls at the next election and achieve the representation due him in the newly-elected legislature.

This is not a case in which racial preferences need be ordered to provide relief for individual victims of employment discrimination[3] or where the composition or structure of an existing work force is the result of past discrimination and can only be changed by injecting racial considerations into employment decisions.[4] Nor is it a school integration case in which racial considerations must be considered to assure disestablishment of a segregated system and creation of a unitary system.[5] Here, by the elimination of the appropriate test and the printing of the ballot in the appropriate language the violation is rectified. As a further remedy, the Voting Rights Act requires that any changes in voting qualifications or procedures including redistricting must be approved, in order to assure that such changes do not have a racially discriminatory purpose or effect. Nowhere, however, does that Act and its recent hotly debated extension, require or even authorize, as a remedy for any past possible underrepresentation which may have resulted from the existence of a literacy test or English-only ballot, the drawing of district lines to guarantee working control in particular districts to the minorities who might have been affected by these devices.

3. See, *e.g.*, *Castro* v. *Beecher*, 459 F. 2d 725 (1st Cir. 1972).

4. *Carter* v. *Gallagher*, 452 F. 2d 315 (8th Cir. 1971), cert. den. 406 U.S. 950 (1972); *Contractors Ass'n of Eastern Pennsylvania* v. *Secretary of Labor*, 442 F. 2d 159 (3rd Cir. 1971), cert. den. 404 U.S. 854 (1971); see also *United States* v. *Ironworkers Local 86*, 443 F. 2d 544 (9th Cir. 1971), cert. den. 404 U.S. 984 (1971); *Castro* v. *Beecher*, 459 F. 2d 725 (1st Cir. 1972); *United States* v. *International Brotherhood of Electrical Workers Local 212*, 472 F. 2d 634 (6th Cir. 1973); *United States* v. *Wood, Wire & Metal Lathers Union, Local 46*, 471 F. 2d 408 (2d Cir. 1973); *Bridgeport Guardians, Inc.* v. *Commission*, 482 F. 2d 1333 (2d Cir. 1973).

5. *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971); *North Carolina State Board of Education* v. *Swann*, 402 U.S. 43 (1971); *Green* v. *County School Board*, 391 U.S. 430 (1968).



### *B. There Was No Affirmative Finding that the 1972 Apportionment Was Designed to Reduce or Suppress Minority Representation*

The Court of Appeals, however, argued that the state's prior use of the literacy test and untranslated English ballot coupled with the 1972 redistricting constituted "invidious discrimination in favor of white voters and against nonwhites * * *" and thus justified the 1974 racial gerrymander. (510 F.2d 525).

As we have shown, the mere existence of the trigger factors does not warrant the extraordinary remedy of drawing district lines to assure certain races voting control of particular legislative districts.

Nor did the Attorney General affirmatively find such "invidious discrimination" in the drawing of the 1972 lines as to give constitutional sanctions to such a remedy. The Attorney General stated:

> "First, with respect to the Kings County congressional redistricting, the lines defining district 12 and

surrounding districts *appear* to have the effect of overly concentrating black neighborhoods into district 12, while simultaneously fragmenting adjoining black and Puerto Rican concentrations into the surrounding majority white districts. We have not been presented with any compelling justification for such configuration and our own analysis reveals none. Moreover, it appears that other rational and compact alternative districting could achieve population equality without such an effect. (emphasis added)

"Senate district 18 *appears* to have an abnormally high minority concentration while adjoining minority neighborhoods are significantly diffused into surrounding districts. In the less populous proposed assembly districts, the minority population *appears* to be concentrated into districts 53, 54, 55 and 56, while minority neighborhoods adjoining those districts are diffused into a number of other districts." (emphasis added)

He concluded:

> "* * * on the basis of all the available demographic facts and comments received * * * as well as the state's legal burden of proving that the submitted plans have neither the purpose nor the effect of abridging the right to vote because of race or color, we have concluded that the proscribed effect *may* exist in parts of the plans in Kings and New York County." (emphasis added)

We recognize, of course, that the process of legislative apportionment can be used to disfranchise voters and that it has been so used against non-whites. It is for that reason that this Court held, in *Georgia* v. *United States*, 411 U.S. 526 (1973), that apportionment measures were included among those that must receive review under Section 5



where the trigger provisions of Section 4 are operative. And in *White* v. *Regester*, 412 U.S. 753 at 765, this Court established beyond cavil that apportionment procedures may not be used "to cancel out or minimize the voting strength of racial groups."

But the Attorney General's decision does not rise to an affirmative finding that the 1972 apportionment, in so far as it affected Kings County, was employed for that purpose or had that effect. At best his tentative, vague and negatively phrased conclusion might be said to reflect an underlying assumption that use of the word "effect" in Section 5 of the Voting Rights Act requires that legislative districting be approved under that Act only when it assures minority groups actual representation in the legislature in virtually exact proportion to their numbers in the voting age population.[6] That is of course how the drafts-

6. We are aware that, as the Court of Appeals noted (510 F. 2d at 520), the procedures followed after issuance of the April 1 ruling preclude that ruling being set aside in the instant proceeding. But that means only that this proceeding cannot result in a judgment reinstating the 1972 statutes which the Department of Justice action invalidated. It does not mean that the interpretation of the Voting Rights Act expressed by the Attorney General in the April 1 letter is the law of the land or even the law of this case. The courts can still invalidate the 1974 reapportionment if it is constitutionally unsound. And the notion that, regardless of whether it is unsound, it can and must be upheld because prompted by the ruling of April 1, which the state declined to challenge, is patently untenable. Otherwise, the right of other parties to challenge statutes affecting election procedures in a "traditional suit," recognized by the court below (510 F. 2d at 519-20), would be meaningless.

It should be remembered that the petitioners here had no reason to challenge the 1972 apportionment (because they were not injured by it) and had no standing to challenge the April 1 ruling (because they were not injured until the 1974 statutes were adopted). They took their first opportunity to bring the present "traditional suit." It would be intolerable if they were barred from questioning the legal conclusions of the April 1 ruling (and therefore the legality of the 1974 statutes) because the state failed to exercise its statutory rights.

man of the challenged districting interpreted the Attorney General's decision and the subsequent comments of members of his staff. Whether they did so mistakenly or not is immaterial; they acted upon it and the 1974 statute is based on that understanding. It is a construction of the word "effect" in Section 5 which, we urge, distorts the meaning of the statute and intent of Congress, introduces mischievous, dangerous, divisive and impermissible considerations into the apportionment process and differs significantly from the expressed position of this Court.

### *C. A Finding of Prohibited Effect Under Section 5 of the Act Does Not Justify Racial Gerrymander of Districts so as to Assure Racial Proportional Representation in the Legislature.*

Only recently in *City of Richmond* v. *United States*, 95 S. Ct. 2296 (June 24, 1975) this Court considered the meaning of the "effect" clause in an annexation case. Addressing the question of whether the annexation involved had the prohibited effect under Section 5, the Court held that even if it resulted in the *reduction* of the representation of minority groups, the prohibited "effect" would not be found so long as minorities were afforded representation reasonably equivalent to their political strength in the enlarged community. This is a far cry from the mathematical exactitude and 65% quota requirement imposed in the instant case.

The *Richmond* case, moreover, did not involve apportionment and dealt with a situation in which it had been found that the challenged governmental action "was infected by the impermissible purpose of denying the right to vote



based on race through perpetuating white majority power to exclude Negroes from office * * *" (95 S.Ct. at 2305).

This case presents the critical question, not previously decided, whether the Voting Rights Act, in the absence of proof of such impermissible purpose, should be interpreted as permitting a finding that an apportionment statute has the "effect" of abridging the right to vote when lines are drawn in such a way that the proportion of legislative districts controlled by non-whites is not equal to their proportion in the population. More precisely—and more important to our traditional concepts of representative democracy and the electoral process—the issue is whether legislative action to correct this alleged "prohibited effect" *must* assure such control by racially gerrymandering districts so as to place sufficient numbers of such racial group in each district to make certain that such group has not only the opportunity to elect representatives in proportion to its numbers in the population but also sufficient excess population in each district to *guarantee* such representation.

We submit that the Voting Rights Act was never intended to achieve such a result. We agree with Judge Frankel, in his dissent below, when he stated (510 F. 2d at 533) that:

> "There are unbearable and absurd implications in the notion of 'proportionality' between racial or ethnic *population* percentages and percentages of *districts* controlled by different racial or ethnic groups. Beyond the limited skin-color divisions, some 65% white and 35% 'nonwhite,' Kings County has 10.7% Italian immigrants or people with at least one parent who im-

migrated from Italy, some unknown additional percentage of Italian ancestry, a similar figure of 5.9% plus unknown additional Russian, 35% Puerto Rican, 1.7% recently from Austria, 1.7% recently from Ireland (plus many more of Irish ancestry), 30.3% Jewish, 2.2% 'other' religions, 1.3% recent German immigrants, plus a dizzying mass of others 'whose lineage is so diverse as to defy ethnic labels.' *DeFunis* v. *Odegaard*, 416 U.S. 312, 332 (1974) (Douglas, J. Dissenting). How do we figure out the percentage of districts to be controlled by German Catholics, Russian Jews, black as against white Protestants, etc.? The short answer is, of course, that we don't. But the apparent 'test' in today's majority opinion (31.4% nonwhite districts a 'good' figure because less than the 35.1% nonwhite Kings County population) implies that perhaps we should."

One particularly anomalous result is the fate of the Puerto Rican minority in this case. Although the Department of Justice in its July 1, 1974, ruling assumed that this group enjoyed the same rights under the Voting Rights Act as Negroes (pp. 10-11), it found no way to give them "proportionate" representation (pp. 14-16).

Judge Frankel's recital of the complications which would result from approval of the challenged New York statutes and the underlying assumptions on which they rest is not mere *reductio ad absurdum*. Under the newly enacted extension of the Voting Rights Act, if the decision below is upheld, Judge Frankel's prediction of the complex decisions which would have to be made to assure proportionality for racial and ethnic groups in voting will become a reality.



As indicated previously, the Voting Rights Act as extended now will cover not only such non-Southern areas as parts of New York, California, Colorado and Alaska but will protect non-English speaking minorities, including Alaskan natives, persons of Spanish heritage, Asian Americans and American Indians. Pub. L. No. 94-73 (July 24, 1975). The complexities of determining initially whether apportionment laws have the "effect" of abridging the right to vote of each of these groups—in addition to Blacks and Puerto Ricans—and the further difficulties of devising remedies which allot particular groups effective voting control over a sufficient number of districts to assure their proportionate representation in the legislature, boggle the mind. Protecting each particular group, under the "standards" employed by the New York Legislature and approved by the Court below, without at the same time trenching on the rights of other protected groups, or failing to respect historic boundaries and assure compact and contiguous districts, would appear impossible.

But the administrative difficulties created by the interpretation below are the least of the matter. The philosophic implications, the damage to our society through acceptance of its assumptions, are its heart. The concept that particular racial or ethnic groups are entitled to guaranteed representation is divisive and creative of intergroup friction; it elevates group rights over individual concerns, and is productive of legislative representatives who are racial, ethnic and religious partisans rather than concerned

about the interest of the community as a whole. In fact, districting along racial lines has been likened to illegal segregation by race.[7] Nothing in the Voting Rights Act commands the result below and we urge the Court to grant the petition for certiorari so that it may definitely reject the position enunciated therein.

Respectfully submitted,

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7. See Justice Douglas dissenting in *Wright* v. *Rockefeller*, 376 U.S. 60, 61-67 (1964).